

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

RECEIVED

JUL 13 2004

Water Council Docket No. 04-14 WC

In Re: Appeal of Mark and Marianne Bonaiuto

MOTION TO DISMISS APPEAL

NOW COME Daniel and Margaret Osborn and through their attorneys Beaumont & Campbell Prof. Ass'n. respectfully request that the pending Appeal be DISMISSED for lack of standing, stating as follows:

1. That this Appeal is an Appeal of a decision issued on May 12, 2004 granting Daniel and Margaret Osborn a Shoreland Waiver under the provisions of RSA 483-B:11 (II). A copy of this Waiver is attached.
2. That pursuant to Env-WC 201.01, the Rules of Procedure of the Water Council are intended to assure Water Council proceedings are resolved "in accordance with recognized principles of due process and the requirements of RSA 541-A". Id.
3. That pursuant to RSA 483-B:9 (V) (g), the Commissioner is authorized to grant waivers or variances from the standards set forth in the Shoreland Protection Act.
4. That the application process for variance is set forth in Env-WS 1407.
5. That pursuant to Env-WS 1407.01 (h), copies of applications are sent to the local governing body of a community.

6. That there is no provision for sending copies of waiver applications to any third parties, be they abutters or others. Certain provisions for third party notices were actually removed from the statute in 1992. See, Chapter 235, Laws of 1992.
7. That there is no indication that the provisions of RSA 483-B provide an opportunity for appeal of waiver decisions by any party other than the municipality. Compare RSA 483-B:19 with RSA 677:2.
8. That the statutory framework suggests that it is the governing body who is given statutory standing to monitor and, if necessary, appeal decisions of the Commissioner on issues of Shoreland Protection Waivers.
9. That RSA 483-B:4 (I) still contains a definition of *abutter*, which provides (in part):

Abutter means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration... "

Id.

10. That the appealing parties in this matter are not abutters to the Osborn property.
11. That in order to have standing to appeal a decision of an administrative agency, a party must demonstrate they have suffered or will suffer an injury in fact. In Re: Londonderry Neighborhood Coalition, 145 N.H. 201 (2000).
12. No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by

authorized official or agent of the state. Appeal of Richards, 134 N.H. 148, 156 (1991).

13. That the appealing parties are:

- Not abutters
- Not in close proximity
- Have no specific interest that is not unlike all property owners along the shore of Big Island Pond
- Represented by the Town of Atkinson, who appears to have statutory authority to appeal decisions of the Commission.

14. That the appealing parties have not alleged, nor can they demonstrate the requisite "injury in fact" to have standing in this matter. Appeal of Richards, supra, citing, N.H. Banker's Ass'n. vs. Nelson, 113 N.H. 127 (1973).

WHEREFORE, Daniel and Margaret Osborn respectfully request that the Appeal of Mark and Marianne Bonaiuto be DISMISSED.

Respectfully submitted,

Daniel and Margaret Osborn

COPY

Dated: July 13, 2004

By Bernard H. Campbell, Esquire
Beaumont & Campbell Prof. Ass'n.
One Stiles Road - Suite 107
Salem, New Hampshire 03079
Tel. 603-898-2635

CERTIFICATE of SERVICE

I certify that a copy of the foregoing Motion was sent this 13th day of July 2004, first class mail postage prepaid to:

- Mark and Marianne Bonaiuto
7 Valcat Lane
Atkinson, New Hampshire 03811
- Daniel and Margaret Osborn
P.O. Box 808
Hampstead, New Hampshire 03841
- Jared Teutsch, DES Shoreland Protection
NH Department of Environmental Services
P.O. Box 95
Concord, New Hampshire 03302-0095
- Atkinson Conservation Commission
21 Academy Avenue
Atkinson, New Hampshire 03811


COPY
Bernard H. Campbell Esquire



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-2147 FAX (603) 271-6588



SHORELAND WAIVER 2004-00355

Owner: Daniel Osborn, PO Box 808, Hampstead, NH 03841
Project Location: Rock Island, Atkinson
Map 22/Lot 39
Waterbody: Big Island Pond

Page 1 of 2

APPROVAL DATE: 05/12/2004

Based upon review of the above referenced application, in accordance with RSA 483-B:11, II, a Shoreland Waiver was issued. This waiver shall not be considered valid unless signed as specified below.

DESCRIPTION:

Grant waiver to RSA 483-B:11, I to retain an expansion to a nonconforming dwelling on Rock Island in Atkinson, on Big Island Pond.

THIS WAIVER IS SUBJECT TO THE FOLLOWING CONDITIONS:

1. All work shall be conducted in accordance with plans dated December 31, 2003 as received by DES on March 8, 2004.
2. This approval shall not be effective until it has been recorded at the Rockingham County Registry of Deeds.
3. The applicant shall record a restrictive covenant on the deed at the Rockingham County Registry of Deeds prohibiting the construction of accessory structures of any kind on the property until a new septic system has been approved by the State and installed in accordance with the CSPA. A copy of the recorded covenant shall be submitted to DES.
4. A copy of this waiver shall be posted on site during construction in a prominent location visible to inspecting personnel.
5. This waiver does not exempt the owner from obtaining any other necessary local, state or federal permits or approvals.
6. The owner shall maintain compliance with all other requirements of the Comprehensive Shoreland Protection Act, RSA 483-B.

THIS DECISION IS BASED ON THE FOLLOWING FINDINGS:

1. The existing dwelling is located within the 50 ft setback to Big Island Pond and therefore fails to conform to the minimum standard set forth in RSA 483-B:9, II, of the CSPA.
2. In accordance with RSA 483-B:11, I, nonconforming structures may be repaired, renovated, or replaced in kind provided the result is a functionally equivalent use. Such repair or replacement may alter the interior design or existing foundation, but no expansion of the existing footprint or outside dimensions shall be permitted.
3. In accordance with RSA 483-B:11, II, the commissioner shall review proposals which are more nearly conforming than the existing structures, and may waive some of the standards specified in RSA 483-B:9, so long as there is at least the same degree of protection provided to the public waters and the proposal is "more nearly conforming." More nearly conforming "means a proposal for significant changes to the location or size of the existing structures that bring the structures into greater conformity, or a proposal for changes to other aspects of the property, including but not limited to stormwater management, wastewater treatment or traffic volume or flow, or both types of proposal which significantly improve wildlife habitat or resource protection."

4. The applicant has proposed to prohibit, by deed restriction, all future additions and accessory structures unless and until a new upgraded septic system has been approved by the State and installed in accordance with the CSPA. Accessory structures shall include, but not be limited to, gazebos, sheds, patios, additional decks, and boathouses. An upgraded septic system will bring the structure into greater conformity as it will improve wastewater treatment and therefore meets the criteria of 'more nearly conforming' for the issuance of a waiver per RSA 483-B:11, II.

COPY

APPROVED: Michael P. Nolin, Ass't Comm.
for Michael P. Nolin
Commissioner

**BY SIGNING BELOW I HEREBY CERTIFY THAT I HAVE FULLY READ THIS WAIVER AND
AGREE TO ABIDE BY ALL WAIVER CONDITIONS.**

OWNER'S SIGNATURE (required)